United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7479

United States Court of Appeals

FOR THE SECOND CIRCUIT

A. E. HOTCHNER,

Plaintiff-Appellee,

—against—

JOSE LUIS CASTILLO-PUCHE,

Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

MOTION OF
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
WITH BRIEF IN SUPPORT OF DEFENDANT-APPELLANT
URGING REVERSAL OF THE JUDGMENT BELOW

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. (AAP) hereby respectfully moves this Court, pursuant to Rule 29, Fed. R. App. P., for leave to file the brief conditionally filed herewith, as *amicus curiae*, in support of Defendant-Appellant Doubleday & Company, Inc. (Doubleday), urging reversal of the judgment below. Doubleday's written consent to file, by its counsel Satterlee & Stephens, is annexed to this motion as Exhibit A. The motion for leave is made because Plaintiff-Appellee A. E. Hotchner (Hotchner) has declined to consent to the filing.

The AAP

The AAP is a not-for-profit trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks and educational materials in the United States. Its

approximately three hundred members include most of the leading commercial book publishers in the United States and many smaller and non-profit publishers, including university presses and scholarly associations.[1]

AAP members publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States; they therefore create a substantial portion of all books in the United States of and concerning public figures and public officials. Among these works are many books translated from foreign languages or otherwise republished but not originally produced in the United States.

Interest of the AAP

Here at issue is a full-length book of personal reminiscences and literary reflections about Ernest Hemingway and his entourage by a noted Spanish author and journalist, Jose Luis Castillo-Puche (Castillo-Puche). Castillo-Puche's book was originally published in 1968 by the respected Ediciones Destino of Madrid.

In 1971, Doubleday purchased the rights to publish an English-language edition of the book. A few brief comments about Hotchner in the Doubleday translation, published in 1974 under the title *Hemingway in Spain,* are the subject matter of the pending defamation action.

The district court properly found that Hotchner (who made himself famous as Hemingway's Boswell) is a "public figure"—at least for purposes of an action whose focus is a book about Hemingway and his followers. The court

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[1] Doubleday, one of the largest and most respected book-publishing houses in the United States, is a prominent member of the AAP. At the present time, however, no representative of Doubleday sits on AAP's Board of Directors or Executive Committee, the governing bodies that have ultimate responsibility for the AAP's policies and public pronouncements, including *amicus curiae* briefs such as the one annexed.

therefore properly ruled that Hotchner's claims were subject to the constitutional constraints set forth in *New York Times* v. *Sullivan*[2] and its progeny.[3] But the district court thereafter lost sight of the cardinal constitutional principles identified in those cases.

Plaintiff was permitted to place the entire Castillo-Puche book on trial. The Spanish version was indicted as was Doubleday's English translation; the accuracy of passages concerning Hotchner was challenged as was the accuracy of many statements wholly unrelated to Hotchner's claims.[4] Doubleday's motion for summary judgment was denied and the case permitted to go to the jury on evidence clearly insufficient as a matter of constitutional law.

Ultimately, this process—entirely at odds with the *New York Times* cases and at war with established First Amendment doctrine—had its effect. The jury found Doubleday had acted in reckless disregard of the truth or falsity of its published statements concerning Hotchner—a finding unsupportable, in *amicus'* view, on the factual record as well as on the law. And a massive $125,000 punitive damage award was imposed upon this respected book publishing house—again, in *amicus'* view, a palpably unjustifiable, indeed an outrageous, result.

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[2] 376 U.S. 254 (1966) (hereinafter referred to as "*New York Times*" or "the *New York Times* case").

[3] *See, e.g., Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co* v. *Butts*, 388 U.S. 130 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). (These cases are sometimes referred to herein as the "*New York Times* cases" or the "*New York Times* line of cases.")

[4] In *amicus'* view, the district judge's trial rulings, sanctioning Hotchner's wide-ranging inquiry into the accuracy of the entire book, raises other, very substantial First Amendment issues which *amicus* will not discuss at length in its brief.

Accordingly, this appeal presents for consideration several critically important questions concerning the scope and proper application of a book publisher's constitutional privilege, under the *New York Times* line of cases, against defamation claims asserted by public figures.[5] Of these, two issues of overriding significance concern the AAP and have prompted this application to file the annexed brief, as *amicus curiae*.

The first involves the serious constitutional implications of plaintiff's pervasive failure of proof. For, *amicus* respectfully submits, it is impossible to read the record below without entertaining grave doubts as to the sufficiency of the evidence on nearly every element of proof held by the Supreme Court to be essential, as a matter of constitutional law, before a publisher may be stripped of its *New York Times* privilege in defamation actions by public figures.

Having attempted to delete statements critical of Hotchner, was Doubleday sufficiently on notice of the book's alleged defamatory potential?[6] Did the publication indeed defame Hotchner? Was the publisher on notice of the falsity of the statements about Hotchner? Or did the publisher act in "reckless disregard" of the "probable falsity" of the statements? Is it clear that the challenged passages were indeed false?

In *amicus'* view, none of these constitutional prerequisites to recovery could affirmatively be answered on the record below. Far from supporting the finding of liability, the record demonstrates that Doubleday acted without actual knowledge or reckless disregard of falsity, in the good faith belief that the author's statements about Hotch-

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[5] The invasion of privacy claim, also asserted against the publisher, will not be separately treated in *amicus'* brief.

[6] See *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 348: "[T]he substance of the defamatory statement [must] 'make substantial danger to reputation apparent.'"

ner, as published, were not defamatory and that they were either true, or they were privileged as fair comment—i.e., they were neither "true" nor "false" in the constitutional sense.

The record therefore falls far short of proving by "clear and convincing" evidence the deliberate falsification or reckless disregard for accuracy demanded by *New York Times*.[7] Affirmance of the judgment below upon such a record would thus be of grave concern to the AAP and to all publishers as it would call into question the type of standards of information gathering and dissemination ordinarily followed by responsible publishers.

The second issue of concern to the AAP is presented by the staggering punitive damage award—wholly unrelated to proof of actual damage—here assessed against the publisher.[8] Particularly in light of the failures of proof adverted to above, and in the absence of demonstrated animus toward Hotchner or other reprehensible conduct by the publisher, affirmance of this award would necessarily inhibit the "open and robust" exercise of First Amendment freedoms the *New York Times* privilege is intended to foster.

In requesting leave to file an *amicus curiae* brief on these two issues, the interest of the AAP is not merely in defending a member publisher—although the AAP does believe that the result reached below is spectacularly unjust—but in promoting a legal climate within which publishers may in good faith produce books on issues of public moment without the chilling fear that they will be subjected to crushing punitive awards for innocent (or merely neg-

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[7] See *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 153-154 citing *New York Times*, 376 U.S. at 286-288, 292 and *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 73-75, 79.

[8] The actual damage award was $1. The punitive award was $125,000. This amounts to well over four times the publisher's total gross receipts for the book. (*cf.* 195a)

ligent) conduct at the unrestrained discretion of judges or juries.

Desirability of the *Amicus Curiae* Brief

AAP believes that consideration of its brief *amicus curiae* would be of assistance to the Court in resolving these important constitutional issues in the broader context of their practical impact on the editorial standards and practices of the book publishing industry as well as upon the free exercise of book publishers' First Amendment rights.

Conclusion

The AAP respectfully submits that its motion for leave to file the brief conditionally filed herewith, as *amicus curiae*, in support of defendant-appellant urging reversal of the judgment below should be granted.

Respectfully submitted,

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Re: Hotchner v. Doubleday (76-7479)
U.S. Court of Appeals, Second Circuit

Dear Mr. Kaufman:

On behalf of the appellant Doubleday & Company, Inc., we hereby consent to the filing by the Association of American Publishers, Inc. of a brief as amicus curiae on the above appeal.

Very truly yours,

SATTERLEE & STEPHENS

By [signature]

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EXHIBIT A

Exhibit A

United States Court of Appeals

FOR THE SECOND CIRCUIT

A. E. HOTCHNER,

Plaintiff-Appellee,

—against—

JOSE LUIS CASTILLO-PUCHE,

Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

BRIEF OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., *AMICUS CURIAE*, IN SUPPORT OF DEFENDANT-APPELLANT URGING REVERSAL OF THE JUDGMENT BELOW

Interest of the AAP

The interest of the Association of American Publishers, Inc. (AAP) is set forth in the motion for leave to file, *supra*, at pp. 2-6.

Preliminary Statement

The critical importance of maintaining a proper accommodation between the law of defamation and the freedoms of speech and press protected by the First and Fourteenth Amendments has only recently been fully recognized. In

New York Times v. *Sullivan*, 376 U.S. 254 (1964), the Supreme Court for the first time set new and substantial constitutional limits on defamation claims asserted by public persons. Since 1964, the *New York Times* privilege has been extended and amplified in a series of landmark Supreme court rulings. *See, e.g., Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

The governing principles established in these Supreme Court decisions were most recently reiterated by this Court in *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), where the Court stated:

> "When we confront the constitutional law of libel it is at once evident, as set forth first in *New York Times Co.* v. *Sullivan, supra*, that our primary concern must be the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks . . .' 376 U.S. at 270.
>
> • • •
>
> Our constitution thus contemplates a bias toward unfettered speech at the expense, perhaps, of compensation for harm to reputation, at least where a public figure and a topic of enormous public interest, going to the heart of political discourse, is concerned." (citations omitted) (539 F.2d at 889)

In this case, *amicus* respectfully submits, the promise of *New York Times*—that publishers will be held harmless from liability for defamation claims asserted by public officials or public figures so long as the material they pub-

lish is not "deliberately falsified" or "published recklessly despite the publisher's awareness of probable falsity"[1]—has been dishonored.

Under the impermissibly loose standard of recoverable defamation imposed in the district court, the *New York Times* commitment to "uninhibited, robust" even "sometimes unpleasantly sharp" debate on public issues would soon be reduced to a meaningless incantation, protecting nothing of real substance or value.[2] Indeed, in *amicus'* view, the allegedly defamatory materials here were nothing more than mild statements of opinion well within the bounds of fair comment, or of "facts" not subject to conclusive verification and as to which the publisher could have had no notice of probable falsity.[3] Yet these were held to be the basis for a finding of knowing or reckless publication with "actual malice."

Under the draconian standard of liability for punitive damages imposed, vigorous debate of public issues would impermissibly be chilled by the fear of liability for onerous exemplary awards, thus leading inevitably to the kind of self-censorship which is at odds with a free and vigorous press and which the *New York Times* cases seek to prevent. Although, on *amicus'* reading, the trial record entirely

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[1] *Curtis Publishing Co.* v. *Butts, supra*, 388 U.S. at 153. It is well to remember that the "conditional privilege" adopted in *New York Times* was criticized by Justices Black, Goldberg and Douglas, who urged adoption of an absolute privilege on the theory that no rule permitting subjective evaluation of the publisher's state of mind can prevent juries from punishing disfavored expression, 376 U.S. at 295, 298 n.2., 302 n.4. In *amicus'* view, this case demonstrates that those fears were not unfounded.

[2] New York Times, supra, 376 U.S. at 270.

[3] The six statements found actionable are set forth verbatim in an Appendix to this brief. In *amicus'* view, it is impossible to read the verbatim transcript of these six mild statements without concluding, as did this Court in *Buckley* v. *Littell, supra*, that the district judge here "unfortunately, did not approach the task of interpreting the . . . meaning of the alleged libels in light of the imperatives of [*New York Times*]. . . ." (539 F.2d at 888 n.3)

negates any allegation of purposefully malicious or blatantly reckless falsification by the publisher, and although the plaintiff had suffered *no* actual damages, the district court sustained an award of $125,000 in punitive damages.

Amicus therefore most respectfully submits that the judgment must be reversed because:

(i) Doubleday's conduct did not here amount to an extreme departure from the type of information gathering and dissemination ordinarily adhered to by responsible publishers. Accordingly, the imposition of liability under the stricter *New York Times* "actual malice" test cannot be upheld. (POINT I)

(ii) Even if "actual malice" had been proven, the punitive award must nonetheless be reversed, under the circumstances presented here, because *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. 323, and related cases suggest that:

(a) Punitive damages may not be awarded—even in a public figure/actual malice defamation action—unless there is proof of consciously motivated animus or other reprehensible conduct and unless such damages bear a reasonable relationship—strictly scrutinized as a matter of law in light of First Amendment sensitivities—to the defendant's culpability and to the gravity of the harm actually inflicted. (POINT IIA)

(b) Finally, because case by case appellate modification of excessive punitive awards does not adequately vindicate the First Amendment interests here at stake, the principle that punitive damages should not be awarded absent proof of ill-will and of reasonable relation to culpability and actual injury ought to be adopted as a constitutionally-mandated rule of law. (POINT IIB)

I.

Doubleday's conduct did not amount to an extreme departure from the type of standards ordinarily adhered to by responsible publishers; accordingly, Doubleday cannot be found liable under the *New York Times* actual malice standard.

A. *Doubleday's Conduct Did Not Amount to an Extreme Departure From the Type of Standards Ordinarily Adhered to by Responsible Publishers.*

There are no uniform guidelines that define the standards of the book publishing industry with respect to prepublication review of materials for factual accuracy or legal compliance. However, reasonable norms can be extrapolated. In *amicus'* view, measured by such norms, the procedures Doubleday followed here for checking and legal compliance were well within the type of standards adhered to by responsible publishers within the industry and demonstrate conclusively that a finding of recklessness is not supportable.[4]

The following facts pertinent to Doubleday's state of mind and to the procedures it followed to assure that the Castillo-Puche translation was authoritative, generally accurate and non-defamatory are undisputed or not fairly disputable on the record below.[5] In *amicus'* view, these

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[4] In *amicus'* opinion, the record also establishes that Doubleday did not act *negligently* in adhering to these reasonable procedures as it was preparing the Castillo-Puche manuscript for publication. If this Court agrees, the judgment must of course be reversed since the First Amendment prohibits a State from imposing strict liability for defamation without fault. *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 347. However, it is of no moment whether or not the jury could properly have made a finding of negligence here since the applicable constitutional standard is far more demanding and was quite clearly not met. See Point IB, *infra*, pp. 21-24.

[5] A detailed analysis of the factual record underlying the judgment is undertaken because, as this Court has recognized, the First

facts demonstrate that Doubleday's conduct did not substantially depart from the type of standards ordinarily adhered to by responsible publishers and, accordingly, cannot be the basis for recovery under the strict actual malice rule applicable in this case.

—Doubleday first learned of the Castillo-Puche book from a very favorable mention that appeared in an article published by the *Saturday Review* in 1969. This article, written by an authority in comparative literature, expressed no doubts concerning the Spanish edition's accuracy. (Exh. P, 245a[6]; 345-346a)

—Before publishing the Castillo-Puche book Doubleday sent the manuscript—in the original Spanish—to two expert and objective readers. Both were knowledgeable concerning Hemingway and both confirmed that the book was of very high quality and literary worth. Neither of these readers expressed observations about the book's accuracy.[7] (Exhs. Q and R, 246-248a; 347-348a)

Amendment "requires a careful appellate review of the facts found at trial which have constitutional significance." *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976). Indeed, the need for this "independent examination of the whole record" for proof with "convincing clarity" of "actual malice" and the other constitutionally mandated elements of a public figure defamation claim was recognized in the *New York Times* case itself. 376 U.S. at 284-289. See also *Time, Inc.* v. *Pape*, *supra*, 401 U.S. at 284 (1971); *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 732-733.

[6] Record references to materials that appear in the Appendix are cited as "—a". References to transcript materials not in the Appendix are cited as "—t".

[7] In the circumstances, it is ironic yet most significant that—long before this litigation was commenced—one of the two expert readers commissioned by Doubleday saw fit to comment that the Castillo-Puche reminiscenses "have a sort of noble honesty clearly missing in Hotchner." (Exh. Q, 246a) The unfavorable reference is apparently to plaintiff A. E. Hotchner's best-selling *Papa Hemingway* (Random House 1965).

—Doubleday ascertained that Castillo-Puche was an established, experienced and highly respected Spanish novelist, journalist and critic. (Exh. X; 361a) The publisher of the original Spanish edition was also well known in the industry to be reputable and was considered by Doubleday as such. (599t)

—Doubleday employed a reputable, highly competent, award-winning translator to prepare the English manuscript. The translator expressed no reservations about the validity or accuracy of the manuscript. (Exh. S; 196-198a; 349-352a; 35[illegible]a)

—A Doubleday senior editor, with 5 year's experience as an editor of more than 50 books, read the manuscript for accuracy and for possible defamation. She detected eleven derogatory passages concerning Hotchner which she referred to Doubleday's contracts department for further review. (344-345a; 354-355a)

—A second, copy editor read the manuscript for obvious errors and internal inconsistencies. None concerning Hotchner were found. (352-354a)

—Doubleday's contracts department reviewed the derogatory passages in question and recommended that certain of them be "toned down" or eliminated. On this basis, of the eleven passages reviewed the senior editor removed five passages altogether and revised another three. These revised passages were again reviewed and approved by the contracts department. (Exhs. 5A-5G, 203-210a; 354-360a; 374-376a)

—Doubleday's senior editor wrote to Castillo-Puche—although the Spanish author was not under contract to Doubleday and was not required to assist Doubleday in any way—to review these changes with the author. Castillo-Puche confirmed the accuracy of the passages, as originally written and as revised for the Doubleday edition. (360-361a; Exhs. 11-14, 216-225a)

In *amicus'* view, these undisputed facts demonstrate that Doubleday here followed procedures that are well within the type of standards for information gathering and dissemination accepted by responsible publishers. Absent direct proof in the record of knowledge by the publisher of falsity, this alone conclusively demonstrates that Doubleday cannot be held to have published with reckless disregard of truth or falsity as *New York Times* requires.

A book publisher cannot check or confirm the accuracy of every factual assertion made and it certainly cannot guarantee the validity or integrity of every opinion that appears in its publications. To require otherwise would, as a practical matter, turn every publisher into an author or every author into a self-publisher. And it would, as a matter of law, violate the *New York Times* principle that a finding of "actual malice" must be based, not on what a publisher could or should have learned, but only on what the publisher in fact knew or recklessly disregarded. Indeed, the Supreme Court has consistently refused to permit libel recovery for investigative failures alone. Hence, the adoption in *New York Times* of a subjective standard that focuses not on ultimate "*truth*," but on the publisher's *actual knowledge* at the time of publication. *New York Times*, 376 U.S. at 287-88. *See also Rosenbloom* v. *Metromedia, Inc., supra*, 403 U.S. at 56; *St. Amant* v. *Thompson, supra*, 390 U.S. at 731.

In *amicus'* view, Doubleday did not act recklessly when it relied upon the results of these fact checking and legal compliance procedures in publishing its English-language edition of the Castillo-Puche book. No defamation standard of which *amicus* is aware—whether *New York Times'* "actual malice" test or any less demanding standard short of strict liability—required the publisher to do more, under the circumstances. This conclusion is based on the following analysis of the undisputed facts just reviewed:

—When acquiring manuscripts a book publisher must rely either on its own knowledge of the subject matter covered or on the opinion of others. Doubleday's reliance upon one very favorable outside review and the two expert "reader's reports"—all based on the original Spanish edition[8]—was certainly not reckless under the circumstances.[9]

—Doubleday quite properly looked upon their prior knowledge of the original publisher's distinguished reputation, and the knowledge they acquired of Castillo-Puche's good reputation through the reviews, as justifying its general reliance upon the original work as accurate and truthful. Reasonable reliance by the publisher upon the reputation of those who sponsor material for publication has specifically been held by the Supreme Court to negate an allegation of actual malice. *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 733; *New York Times*, 376 U.S. at 287.

—Doubleday properly relied upon the fact that the Spanish edition was published in 1968 and Hotchner had

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[8] The fact that Doubleday's reviewers all read the book in the original Spanish is very significant in light of Plaintiff-Appellee's effort throughout the trial to dispute Doubleday's *bona fides* by offering a translation whose strong language—it is claimed—should somehow have put Doubleday on notice as to Castillo-Puche's ill-will toward Hotchner. Of course, ill-will is not defamation and the author's ill-will cannot be attributed to the publisher particularly where the publisher has no basis for believing the author's statements to be false. But, in any event, the force of Hotchner's proof is clearly blunted by the fact that Doubleday's expert reviewer and commissioned readers also read the book in the original Spanish yet did not advise of inaccuracy or untoward misstatement.

[9] The existence of these favorable and authoritative reviews and reports wholly undermines Hotchner's "Clifford Irving" theory—that the Castillo-Puche manuscript was an outright fabrication and Doubleday either knew or should have known as much. (14t; 703-704t) Indeed, the theory is so outrageously prejudicial that, in *amicus'* view, the district judge's failure to exclude it is itself an error justifying reversal of the judgment entered.

brought no action against the book in the six years prior to publication. Moreover, in Doubleday's translation, the statements concerning Hotchner were—by virtue of Doubleday's efforts to rid the book of unnecessarily critical material—markedly milder than the original Spanish version.[10]

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[10] It is fairly arguable, *amicus* respectfully submits, that the six statements upon which the jury rested its verdict were not—as a matter of common-law—properly found to be defamatory. Moreover, as a matter of constitutional law, where a publisher acts in good faith to eliminate potentially defamatory material and there is substantial evidence that the publisher thereupon believes the offensive material has been excised, the publication cannot be held actionable. As Mr. Justice Powell noted in *Gertz* v. *Robert Welch, Inc.*:

> "[The *private* figure standard] recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. *At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent.'* This phrase places in perspective the conclusion we announce today. *Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential.*" (Emphasis added) (418 U.S. at 348.)

Even if the statements about Hotchner were defamatory, however, it is *amicus*' view that upon no fair reading of the record can it reasonably be concluded that the publisher was on notice of their probable falsity. Of the six statements ultimately found by the jury to be defamatory, five represented Castillo-Puche's opinion or his fair comment on Hotchner's character. *Amicus* is aware of no evidence in the record that suggests the publisher was aware that these mildly critical opinions, published in the context of a personal memoir, were not actually held by the author. Indeed, the only evidence bearing on the question—Castillo-Puche's letter to Medina—can fairly be viewed as confirmation that the opinions expressed in the book were firmly held by Castillo-Puche. (Exhs. 12 and 14, 219-220a, 224-225a) The sixth statement, purporting to quote Hemingway speaking to the author during an intimate conversation, is quite clearly not capable of being "substantiated" (i.e., proven either true or false) in any way. (See Exh. 9, 214a) It is, in *amicus*' view, erroneous to conclude—and

—Having no reason whatever to believe that Castillo-Puche's statements about Hotchner were not true beyond the naked fact that they were critical of Hotchner, Doubleday was under no obligation to investigate their accuracy further.[11] Indeed, under the circumstances, the Doubleday response to Castillo-Puche's "bitchy" comments (See Exh. 7, 212a)—to eliminate some, to "tone down" others and to pursue the matter further with the author—in *amicus'* view completely negates any suggestion of recklessness by the publisher.

—Doubleday's duty to avoid "reckless disregard" of "probable falsity" must also be considered in light of the availability of sources that could either confirm or deny the truth and accuracy of its publication. The Doubleday book was a translation and not an original

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there is not a scintilla of evidence in the record to support such a conclusion—that Doubleday was ever made aware of the "probable falsity" of this statement.

[11] As was recently stated by the New York Court of Appeals in a slightly different context in *James* v. *Gannett*, 40 N.Y.2d 415 (1976):

"Publications establish their own method of verifying information and the fact that the subject of an article was not offered, prior to publication, an opportunity for review and comment does not, by itself, establish that the publisher acted maliciously or recklessly. Only where the publisher has, or should have, reasons to doubt the accuracy of the report of its reporter is there a legal duty to make further inquiry. Thus, for example, a failure to investigate a story does not in itself establish the bad faith of the newspaper. (*St. Amant* v. *Thompson*, 390 U.S. 727, 733.) The appropriate test is whether a publisher had or should have had serious doubt as to the truth of the publication. In other words, it must be established that there were obvious reasons to doubt the veracity of the report. (*St. Amant* v. *Thompson*, 390 U.S. at p. 732, *supra; Trails West* v. *Wolff*, 32 N.Y.2d 207, 219.) Here, the plaintiff has pointed to no circumstances which should have placed the publisher on guard. There is no indication that the reporter was not competent to perform his assignment or that the reporter had any reason to submit a false account of the interview. Similarly, the report, on its face, does not contain any statement that would arouse the suspicions of a careful publisher or that would give cause for further inquiry." (40 N.Y.2d at 424)

publication. Doubleday had no contractual relationship with Castillo-Puche and, obviously, no easy access to the author who lived in Spain. Especially under these circumstances, Doubleday's documented efforts to review the Hotchner passages with Castillo-Puche certainly cannot be said to amount to recklessness.[12]

Amicus cannot, but it need not, undertake to demonstrate that Doubleday was wholly without fault in publishing the

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[12] The problem of access to the author in such circumstances is not an insignificant one for book publishers. According to the authoritative *Bowker Annual of Library & Book Trade Information* (Xerox, 21st ed. 1976), of the 39,372 new titles and new editions of books issued by American publishers in 1975, 1,546 represented translations into English from foreign languages. (*Compare* Table 1 at 179 to Table 3 at 181.) Another 4,159 were books originally published abroad and imported or reissued under a U.S. publisher's imprint. (*See* Table 4 at 182.) Thus, even putting to one side similar impediments to source verification domestically, foreign translations or imports as to which close checking with the author or other sources is certainly extremely difficult, if not entirely foreclosed, accounted in 1975 for as much as 15% of the entire U.S. total. (This percentage might be somewhat overstated to the extent that titles in translation are also imported books.) Data for recent prior years (1972-1974) is comparable, such books totalling between 12 and 13% of U.S. publications. (*See Bowker Annual of Library & Book Trade Information* (Xerox, 19th ed. 1974 at 194, 196)

Obviously, any rule of conduct that would require the U.S. publishers of such foreign or translated titles to look behind all matter on its face derogatory of a living individual to attempt to investigate its accuracy with a foreign author or with others abroad who might confirm or deny the facts stated therein, would threaten serious damage to this aspect of the U.S. book publishing output. Conclusive substantiation would often be impossible. Therefore, the publisher would either have to forego publication of any such derogatory material—although not on notice of falsity—or publish at his peril. Such a Hobson's choice would create a most significant impediment to the free and uninhibited operations of the press in this country and to the highly valued cross-cultural exchange of information among nations. With all respect, *amicus* respectfully submits that no such onerous rule has ever been sanctioned by the Supreme Court or this Court. For example, in *New York Times*, the information that would allegedly have established falsity was not in the possession of a source overseas, but in a file in the Times' own office. Yet no duty to investigate was imposed. 376 U.S. at 287.

allegedly "false" statements. The significant point is not whether Doubleday's agents were negligent in departing from the responsible procedures it followed but whether publication of a wilful and deliberate, or reckless, falsehood has been established here as a matter of law.

In *amicus'* view, under the demanding standards of *New York Times,* liability due to reckless behavior was not properly established on the record below. To hold that it was, *amicus* most respectfully submits, would be to place a constitutionally intolerable burden on the publisher—in contravention of the clear meaning of *New York Times* and its progeny—to weed out *all* statements critical of public persons that cannot be conclusively substantiated at the time of publication.

B. *Where It Is Not Proven that the Publisher Acted in a Grossly Irresponsible Manner, Liability Cannot Be Imposed under the Stricter Actual Malice Test.*

As noted in Point IA, in *amicus'* view the record quite clearly demonstrates that Doubleday's editors and management followed procedures for fact checking and legal compliance that are well within the type of standards accepted by responsible publishers. Even negligent departure from those standards would not be sufficient to support a claim under the *New York Times* actual malice test. Only proof of actual knowledge of falsity or reckless disregard of "probable falsity" would suffice.

Here, although both theories were argued, it is quite clear that there was not a scintilla of evidence demonstrating actual knowledge. This was confirmed by the district judge when he observed:

> "I don't find evidence that they [Doubleday] knew it was false. I think there is evidence from which an inference could be drawn that perhaps they published with reckless disregard as to whether it was true or not." (342a)

The jury must, therefore, have returned its verdict on the recklessness theory. Indeed, that is how the district judge so characterized the jury's finding on liability in his decison denying Doubleday's motion for judgment *n.o.v.*:

> "Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity." (177-178a)

Amicus respectfully submits that any definition of "recklessness" that imposes liability for actions well within the type of information gathering and dissemination accepted by responsible publishers must necessarily violate the letter and spirit of *New York Times* and its progeny—decisions clearly intended to confine actionable public figure defamation claims to cases involving *gross* departures from responsible publishing standards where probable falsity is known. Even highly unreasonable and negligent conduct is not enough.

In *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 133-162, Mr. Justice Harlan made the case for a less demanding public figure standard than that created as to public *officials* in *New York Times*. Under the Harlan view:

> "[T]he rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. *We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*" (Emphasis added) (388 U.S. at 155)

But Justice Harlan lost this argument when the majority in *Gertz* opted to extend the *New York Times* principle to public figure cases:

> *"The New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person.* Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation *only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."* (Emphasis added) (418 U.S. at 342)

In *St. Amant* v. *Thompson, supra*, 390 U.S. 727, the critical distinction between *New York Times* and a lesser negligence standard was made plain:

> "Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." (390 U.S. at 731-732)

See also *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6, 12-13 (1970).

Indeed, even if this were a *private* figure case and New York state common law applied, Hotchner would have had to meet the quite demanding standards New York has defined under *Gertz*. Thus, in *Chapadeau* v. *Utica Observer*

Dispatch, 38 N.Y.2d 196 (1975), the New York Court of Appeals defined New York's private figure standard as follows:

> "We now hold that within the limits imposed by the Supreme Court where the contents of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the [private] party defamed may recover; *however, to warrant such recovery he must establish, by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.*" (Emphasis added) (38 N.Y.2d at 199)

With all respect *amicus* suggests, in view of all the foregoing, that even this lesser New York standard for private figure liability has not here been met. Certainly, if this is true, the more demanding standards of reckless disregard defined by the Supreme Court in *New York Times* and *Gertz* in order to avoid self-censorship by the news media have not—and cannot—be met. *Amicus* most respectfully urges this Court to follow the Supreme Court's lead[13] by assuring that an impermissibly loose definition of "recklessness" not be permitted to undermine the tough constitutional standards mandated by the Supreme Court in its recent decisions.

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[13] Several of the leading Supreme Court decisions since *New York Times* have overturned improper findings of "recklessness" under the "actual malice" test upon a searching review of the constitutionally relevant facts. See, *e.g.*, *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 730-731; *Curtis Publishing Co.* v. *Butts*, *supra*, 388 U.S. at 158-159; *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 76-79. *Cf. Henry* v. *Collins*, 380 U.S. 356 (1965). *See also Buckley* v. *Littell*, *supra*, 539 F.2d at 888 n.3.

II.

The excessive punitive damage award is constitutionally impermissible.

A. *Punitive Damages May Not Be Awarded Unless There Is Proof of Ill-Will or Other Consciously Motivated Reprehensible Conduct and There Is Some Reasonable Relation Between Punitive and Actual Damages.*

Even if the judgment as to liability were affirmed, a singularly important question remains—Can the massive punitive damage award here imposed be squared with *Gertz* v. *Robert Welch, Inc., supra*, 418 U.S. 323 and with related Supreme Court cases?[14]

The Supreme Court's developing understanding of the potential conflict between the First Amendment and the general law of defamation has been matched—if not spurred—by a growing perception that the traditional concept of punitive damage awards cannot easily be harmonized with our national commitment to the uninhibited exercise of First Amendment freedoms. Recent cases teach that punitive damages in libel actions are disfavored and, at the very least, must be carefully scrutinized because of their chilling effect upon the freedoms of speech and the press recognized in *New York Times*.

From the very outset, in *New York Times*, the Supreme Court was at pains to make it clear—although the punitive damage issue was not directly raised—[15] that a substantial

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[14] *See, e.g., New York Times* v. *Sullivan, supra*, 376 U.S. 254; *Curtis Publishing Co.* v. *Butts, supra*, 388 U.S. 130; *Rosenbloom* v. *Metromedia, Inc., supra*, 403 U.S. 29.

[15] The Supreme Court did not consider it necessary to deal directly with the concept of punitive damages in *New York Times*. The majority opinion does seem to suggest, however, that the trial court's refusal to charge the jury that punitive damages may be imposed only upon a finding of ill-will combined with recklessness

motivation for development of the "actual malice" rule was the chilling effect of the imposition of massive damages there permitted by the Alabama courts:

> "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." (376 U.S. at 277)
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> • • •
>
> "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." (376 U.S. at 278)

In *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. 130, a punitive damage award was affirmed. But even there Mr. Justice Harlan was careful to note that punitive damages were traditionally limited under common law by the two critically-important principles that *amicus* here urges. First, as to excessive awards, Justice Harlan stated:

> "We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted." (388 U.S. at 160)

And, as to the requisite degree of fault, Harlan indicated:

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may have been improper. The question was not actually reached because, as Mr. Justice Brennan there noted:

> "The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages." (376 U.S. at 283-284 n.24)

"The usual rule in libel actions, and other state-created tort actions, is that a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award." (*Id.* at 160)

• • •

"Moreover, punitive damages require a finding of 'ill-will' under general libel law and it is not unjust that a publisher be forced to pay for the 'venting of his spleen' in a manner which does not meet even the minimum standards required for constitutional protection." (*Id.* at 161)

Thereafter, these concerns led to open condemnation of punitive damages by Justices Marshall and Stewart who argued on constitutional grounds, in *Rosenbloom* v. *Metromedia, Inc., supra,* 403 U.S. 29, for outright elimination of the discretion to impose such exemplary awards, stating:

"The manner in which unlimited discretion may be exercised is plainly unpredictable. And the fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times.*

• • •

The unlimited discretion exercised by juries in awarding punitive . . . damages compounds the problem of self-censorship that necessarily result from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls." (*Id.* at 83, 84) (Dissenting opinion)

Even Justice Harlan, who as noted above had voted to affirm a punitive award in *Curtis Publishing Co.* v. *Butts,* although he did not concur in an across-the-board ban on punitive damages, agreed in *Rosenbloom* that:

> "No doubt my Brother Marshall is correct in asserting that the specter of being forced to pay out substantial punitive damage awards is likely to induce self-censorship." (403 U.S. at 72)
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> • • •
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> "I agree that where these amounts [of punitive damages] bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount at the time of the publication and that this must be a substantial factor in inducing self-censorship. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for the States to permit punitive damages that bear no discernible relationship to the actual harm caused by the publication at issue. . . . It is not surprising, then, that most States apparently require that punitive damages in most private civil actions bear some reasonable relation to the actual damages awarded. . . . However, where the amount of punitive damages awarded bears a reasonable and purposeful relationship to the actual harm done, I cannot agree that the Constitution must be read to prohibit such an award." (403 U.S. at 74-75)

Finally, of course, these developing concerns led to the outright elimination, in *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. 323, of punitive damages in all cases where "the private defamation plaintiff establishes liability under a less demanding standard than that stated by *New York*

Times. . . ." (Id. at 350) The *Gertz* majority detected a dangerous conflict between awards of punitive damages and the constitutional considerations that underlay *New York Times:*

> "The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." (418 U.S. at 349)
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> • • •
>
> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." (*Id.* at 350)

In *amicus'* view, the *Gertz* rationale applies as well here even though the case was ostensibly tried under the *New York Times* standard. This is because the two critical elements—stressed by Mr. Justice Harlan as essential to justify a punitive award—are here absent. First, no finding of ill-will or other consciously-motivated reprehensible conduct was made nor could it here have properly been made.[16] And second, no appropriate limiting instructions

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[16] The district judge's charge to the jury on the issue of punitive damages, by permitting the exemplary award solely on a finding of reckless disregard without reference to consciously-motivated, reprehensible conduct, permitted the jury to award punitive damages upon the same standard under which they considered the

were given with regard to the permissible relationship between punitive and actual damages.[17] And, of course, the district judge refused to exercise his discretion to reduce the award. (178-181a)

For both of these reasons, the punitive award violates the constitutional principles recognized in the line of Supreme Court cases just reviewed. Neither Doubleday's degree of culpability fairly judged (this is quite simply not a "venting of the spleen" type of case), nor the harm actually incurred (actual damages were $1), can in any way justify the outrageously excessive award here imposed. The award must therefore be struck down entirely.

One further word must be added because of the state of the law in this Circuit with respect to the allowance of punitive damages in public figure defamation actions.

In *Goldwater* v. *Ginsburg*, 414 F.2d 324, 340 (2d Cir. 1969)—a case decided before *Gertz*—this Court upheld a rather substantial punitive award and there rejected an argument that punitive damages may never be constitu-

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issue of liability. (453-454a) *Amicus* respectfully submits that this portion of the district judge's charge violates the federal constitutional values here urged as well as New York common law. *See infra*, p. 34 n.19.

[17] Indeed, the judge's charge on this issue can be read, in the circumstances, practically as an invitation to impose the excessive award here at issue:

> "The amount you find as punitive damages need bear no particular ratio or relationship to the amount that you award as compensatory damages except that each measure of damages should be what appears to the jury to be fair and just under the circumstances.
>
> There is no exact rule from which to determine the amount of punitive damages. You may fix such amount, if any, as you find in your sound judgment and discretion the character of this defendant's acts calls for in order to punish the defendant and to deter others from similar acts." (454-455a)

Once again, in *amicus*' view, this charge was erroneous as a matter of constitutional principle as well as under New York law. *See infra*, p. 34 n.19.

tionally awarded, noting that such damages had traditionally been permitted under New York law. It therefore held that "absent a conflict between New York law and the First Amendment's protections" punitive damages could be awarded to a public figure in a libel action in appropriate circumstances. In so holding the Court relied, *inter alia*, upon the (post *New York Times*) affirmance of a punitive damage award by the Supreme Court in *Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. 130, 159-162.

After the Supreme Court's landmark decision in *Gertz,* this Court was again asked, in *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), to ban punitive damages outright. The Court declined this invitation, stating:

> "It may be that *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 350, 94 S. Ct. 2997, and its underlying concern lest punitive damages be used 'selectively to punish expressions of unpopular views' especially with 'the wholly unpredictable amounts' that can be awarded will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure. But to date the Court has not so held, stating in *Gertz* v. *Robert Welch, Inc., supra,* only that punitive damages cannot constitutionally be awarded to a plaintiff who has met a standard of proof less demanding than 'actual malice'. We recognize that this is a somewhat higher standard of proof than that enunciated by Mr. Justice Harlan for the plurality in *Curtis Publishing Co.* v. *Butts, supra,* and it may be that *Gertz* rejects the assertion in *Butts* that 'punitive damages serve a wholly legitimate purpose in the protection of individual reputation'. 388 U.S. at 161, 87 S.Ct. at 1994. But absent clear word from the Court to the contrary, or an *en banc,* we are bound to abide by our own controlling decision in *Goldwater, supra,* and therefore must permit such an award in the appropriate case."(539 F.2d at 897)

In *amicus'* view, neither *Goldwater* nor *Buckley* precludes the rule here sought. *Amicus* is not arguing for the outright abolition of punitive damages and both *Goldwater* and *Buckley* recognized the necessary limitations—absent here—of proven animus and reasonable relation to harm actually suffered.[18] In *Goldwater* punitive awards against two defendants totalling $75,000 were upheld as not excessive in light of the defendants' consciously-motivated, vindictive conduct. In *Buckley*, punitive damages were reduced from a comparatively modest $7,500 to $1,000 in a case where conscious ill-will could be inferred from a long-standing dispute between the two parties.

Moreover, other recent cases—in which the courts have likewise declined to adopt an absolute, constitutionally-based prohibition—have all involved situations where consciously-motivated, reprehensible conduct has clearly been established and there was a reasonable relation between the degree of the defendant's culpability, actual damages and the punitive award imposed. Where—as here—awards are clearly excessive, or unjustifiable, courts have not hesitated to strike them down.

Thus, in *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), although the Fourth Circuit declined to hold that punitive damages may *never* constitutionally be allowed in cases involving public figures, it nonetheless, recognized that:

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[18] *Amicus* does, however, believe that the historical tradition of permitting punitive damages in civil defamation actions—damages rarely awarded in other private civil damage actions—has no place in the constitutional law of libel and therefore favors an absolute prohibition against punitive damages. As this Court noted in *Buckley*, such a rule is not precluded by—and indeed may be the ultimate extension of—the *Gertz* rationale. Indeed, at least two courts have already adopted the rule that punitive damages are never constitutionally permissible. *Maheu* v. *Hughes Tool Company*, 384 F.Supp. 166 (C.D.Cal. 1974) (reading the absolute limitation into *Gertz*); *Stone* v. *Essex County Newspapers, Inc.*, —— Mass. ——, 330 N.E.2d 161 (1975) (barring punitive damages in the Commonwealth of Massachusetts on First Amendment grounds).

> "a case in which the punitive damage award was excessive in relation to the potential harm inherent in the libelous articles . . . might raise First Amendment problems because of the inherent chilling effect of such disproportionate awards on vigorous criticism of public officials." (539 F.2d at 1030)

In *Appleyard* punitive damages of $5,000 (reduced from $75,000 by the district judge) amounted to only one-half of the compensatory damage award.

Once again, in *Fopay* v. *Noveroske*, 31 Ill.App.3d 182, 334 N.E.2d 92 (5th Dist. 1975), the court declined to rule that punitive damages are unconstitutional under all circumstances, although it expressed sympathy with the case against punitive damages. It therefore took care to note that ill-will had been established and that the punitive damages allowed were not excessive under the circumstances—$20,000 as compared to $27,500 in compensatory damages. *See also Davis* v. *Schuchat*, 510 F.2d 731, 735, 736 (D.C. Cir. 1975) (punitive award of $1500 affirmed on a record suggesting that defendant "fabricated his [defamatory] allegations" and "in fact knew of the falsity of his statement").

B. *Case by Case Modification of Excessive Puntive Awards Does Not Adequately Vindicate the Constitutional Interests at Stake.*

Modification of excessive awards by the district judge or on appeal is an alternative to invocation of the constitutional limits that *amicus* advocates. A number of courts, including this Court in the *Buckley* case, have exercised their inherent supervisory discretion so as to avoid the ultimate constitutional dilemma here starkly presented.

But *amicus* believes that the better rule requires reversal of the award in its entirety and expressly-stated adoption of the constitutional limits here urged. Such a rule—requir-

ing a finding of ill-will or reprehensible conduct and reasonable relation between the punitive award and actual damages—would not represent a departure from the relevant Supreme Court decisions, each of which implicitly assumed the applicability and wisdom of such limitations. Indeed, it would simply express what in *amicus'* view has been the implicit understanding since *New York Times* as to the proper constitutional scope of punitive damages.

But as this case so forcefully demonstrates, *post hoc* district or appellate court review of excessive awards quite simply does not adequately vindicate the underlying constitutional principles at stake. Indeed, the excessive punitive award here is proof positive that juries—and judges—very much need the guidance that a clearly-stated, constitutionally-based rule adopting these two standards would provide. Reliance upon the vagaries of the discretionary application of varying state common-law rules—many of which were adopted long before the importance of the *New York Times* principle was fully recognized—is simply not adequate.[19]

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[19] In this case, for example, the district judge apparently misapplied New York state law or perhaps did not consider carefully enough the changes wrought on New York law by *New York Times* and its progeny. Thus, the court below failed to recognize that New York law requires that in libel actions an award of punitive damages must be based on a proven "desire to harm the plaintiff . . ." *Clevenger* v. *Baker Voorhis & Co.*, 19 App.Div.2d 340 (1st Dept. 1963), *aff'd* 14 N.Y.2d 536 (1964), and that punitive damages can be recovered in any New York civil action only if there is evidence of "express malice"—*i.e.*, "ill-will or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act." *Krug* v. *Pitass*, 162 N.Y. 154, 160 (1900). The district court also failed to give heed to the clear recognition in New York that the punitive award in libel actions may not be excessive but must have some reasonable relation to culpability and actual injury. *See, e.g., Faulk* v. *Aware, Inc.*, 19 App.Div.2d 464 (1st Dept. 1963), *aff'd* 14 N.Y.2d 899 (1964), *cert. denied*, 380 U.S. 916 (1965); *Carter* v. *Johnson Publishing Co.*, 19 App.Div.2d 800 (1st Dept. 1963); *Toomey* v. *Farley*, 2 N.Y.2d 71 (1956).

Moreover, modification on appeal does not prevent the "chill" of expression and the "ripple effect" on other potential litigants that inevitably result from permitting such awards to be entered in the first instance. Indeed, it is for very similar reasons that summary relief is now favored in defamation actions to prevent "the danger that speech may be chilled by the mere fact of litigation."[20] Analogously, the cure for improper punitive awards should not be ultimate vindication after costly litigation, but the adoption of an express rule of constitutional law that promises to cut off improper awards at their source.

* * *

The judgments that may be entered in defamation cases are unlike those that are available in most litigations since the bulk of the award is given either to compensate for presumed damages or, if punitive, to punish the defendant. Here the jury awarded Hotchner $125,000 in punitive damages and only $1.00 in compensatory damages. This judgment is shockingly excessive and unjust. It was given, not to compensate Hotchner for any injury, but to punish and deter Doubleday in the performance of its protected function in our constitutional system. It is difficult to understand precisely how this came to pass, but something quite obviously went terribly wrong between the district judge's finding that the actual malice standard must be applied and the return of the jury's crushing verdict.

Amicus submits that this unjust result proves beyond cavil that the manner in which a jury may exercise its discretion severely to punish a disfavored defendant—whether or not clear and convincing evidence of actual malice has been adduced—creates a very real danger of

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[20] *See, e.g., Oliver* v. *The Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y. 1976). *See also Guam* v. *A.F.T.*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Bon Air Hotel* v. *Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *Guitar* v. *Westinghouse Electric Corporation*, 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975); *Meeropol* v. *Nizer*, 381 F.Supp. 29, 32 (S.D.N.Y. 1974).

the self-censorship and consequent infringement on freedom of the press that the *New York Times* case and its progeny sought to prevent. The notions of liberty therein expressed require the most scrupulous appellate review of such verdicts and damage awards in order to preserve a free and vigorous press that presents what it believes to be true information of interest or importance. Events of the last few years alone have graphically taught that a free press must not be timorous or afraid of an honest error that could leave it open to liability for hundreds of thousands of dollars. Moreover, an award such as the one rendered against Doubleday here could be fatal to many smaller publishers who are AAP members. Within a Circuit that is the publishing capital of the United States such debilitating awards should not be sustained.

CONCLUSION

The First Amendment principles here advocated should be given express recognition in this Circuit. Under those principles, the judgment of the Court below must be reversed and the punitive award be struck down entirely.

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Respectfully submitted,

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APPENDIX

APPENDIX

The following are the six passages from *Hemingway In Spain* (Doubleday 1974) found by the jury (i) to be defamatory of Hotchner; (ii) to be false in substance; and (iii) to have been published by Doubleday with knowledge that they were false, or in reckless disregard as to whether they were true or false.

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(1) "It was Ordonez, as I remember, who first called him 'Freckles', and the nickname stuck. He pretended not to mind and was good-natured about everything, but he was such a toady at times that it was sickening." (p. 82)

(2) "The thing I disliked most about Hotchner was his two-faced behavior toward people who were Ernesto's real friends, people such as Juanito Quintana and even Ordonez. Though he was very clever at hiding his true feelings, you could tell that Hotchner was really a hypocrite. But he put up a very good front as Ernesto's mild-mannered, obedient servant." (p. 82)

(3) "Hotchner did his best all summer long to make the imaginary duel between Ordonez and Dominquin a real one; in moments when Ernesto was tense or had no one around for company, he was half convinced he was witnessing a genuine 'civil war' in the bullfight world, though I for my part thought the whole affair was a big laugh, and almost everyone else did too.

As an expert at grinding out publicity in the United States, Hotchner knew what a big splash Ernesto's articles were going to make, and was already bragging about what a coup they would be.

I felt very bad about those *Life* articles, called *The Dangerous Summer*, to tell the truth, because it seemed to me that the whole farce was beneath Ernesto and that he should have refused to have anything to do with it.

'Freckles' was never open and aboveboard. His mild manner and his air of shy diffidence seemed to me quite a cover-up for his exploitation of Ernesto." (p. 83)

(4) "Then he dropped the subject of Davis and started in on Hotchner: 'He's a little precious, but he's a very smart cookie.'

'I can see that he's very fond of you,' I replied.

Then, a little while later, he'd whispered, 'I don't really trust him, though.'" (p. 161)

(5) " 'Freckles' was in complete control of the situation, and I wasn't at all surprised that he had earned lots of money for Ernesto by signing him up with the television networks and mass-circulation American magazines, though I was quite certain Hotchner had been motivated by something other than worshipful admiration for a great writer." (p. 196)

(6) "Only a woman like Mary could have put up with those two ridiculous figures who hung around Ernesto every minute: Davis the jealous watchdog of his fame and fortune and Hotchner the exploiter of his reputation. Only Mary knew that Ernesto's real riches were intangible, and therefore she allowed him and Davis and Hotchner to do as they pleased. It is possible that his two American friends may have sincerely though they were looking after his interests and protecting him." (p. 318)

Service of 2 copies of the within Notice of Motion & Brief is admitted this

6 day of December 1976

[illegible] [illegible] + [illegible],

Attorney for Respondent [illegible]